STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2008
v	No. 277106 Wayne Circuit Court
EDWARD LEE WATKINS, Defendant-Appellant.	LC No. 06-009061-01

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to seven months to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. He was acquitted of a charge of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). We affirm.

On the evening of April 4, 2006, Detroit police officers executed a narcotics search warrant at a single-family residence in Detroit. They announced their presence and forcibly entered. They observed defendant standing in a room at the back of the house and holding a handgun. Officers ordered defendant to get down. Defendant complied, and as he did so, he threw the gun into a corner and said, "please don't shoot." Defendant was arrested, as was a second individual, identified as Thomas Jackson, who was discovered in the house standing near a shotgun. A third individual, identified as Lamont Dixon, fled the house as officers entered and was captured outside. Officers discovered a second shotgun leaning on a wall in the kitchen, and they found two bags of cocaine on the floor where defendant had been lying.

According to defendant, he had been riding with Jackson the evening of the arrest because he needed a ride and he did not have a car. Jackson had agreed to give defendant a ride, but needed to make a couple of stops. A friend of Jackson's who defendant had seen before but did not know was already in the car when Jackson picked defendant up. The trio stopped at the house where defendant was arrested, and Jackson asked defendant to come inside briefly; they entered through a side door from which Jackson's friend removed a padlock. Defendant received a call on his cell phone, and Jackson's friend went to the front window and announced, "here they come." Defendant asked who was coming, and the friend replied that it was the police, whereupon he ran out the side door. Defendant ran into a back room and got onto the

floor. He denied having a gun or drugs, or even seeing either until after the police had arrived. Defendant also testified that officers kicked and hit him before eventually asking him if he wanted to make a statement.

Defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to renew a motion to preserve and produce fingerprints on the gun and the bags of drugs,[1] failed to obtain Dixon's written statement to the police, failed to identify Dixon as a critical witness, and failed to assist defendant "in making a factual basis for his in pro per Motion to Compel Discovery of the Co-Defendant's statement." We do not find that defendant received ineffective assistance of counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). Counsel's performance must have been so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and the deficiency must have been so prejudicial that he was deprived of a fair trial in that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. *Id*.; *People v LeBlanc*, 465 Mich 575, 582-583; 640 NW2d 246 (2002); *McGhee*, *supra* at 625. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant's trial attorney[2] moved to compel discovery, seeking court-ordered fingerprint testing of the gun and the bags holding the cocaine. The prosecutor explained at the hearing on that motion that those items "were never preserved or held for prints." The trial court concluded that, because of the proximity of the scheduled date for trial, testing could not be completed in time; and even if it could, the testing would almost certainly not reveal anything useful because the evidence had not been preserved. Therefore, the trial court denied the motion and instead held that the prosecution's failure to preserve the evidence for fingerprinting would be an argument defendant could make to the jury. The trial court also denied defendant's alternative request for "expert witness fees to get an independent person to come in and do this." Defendant contends that, because trial was eventually rescheduled for purely administrative reasons, counsel should have renewed the motion. However, it appears that the trial court's primary reasoning was that the failure to preserve the firearm and narcotics packaging for fingerprints would make testing pointless and was an argument for the jury. Nothing in the record suggests

[1] As noted, defendant was acquitted of the narcotics charge, so we deem it unnecessary to consider any assertion of error pertaining only to that charge. Felon in possession of a firearm can serve as the underlying felony for a felony-firearm conviction. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

[2] Defendant had several appointed attorneys below.

that the trial court would have ruled differently, or that there was any likelihood that a changed ruling would have benefited defendant in any event.[3] Defense counsel was not required to make a motion that lacked merit. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant also argues that counsel was ineffective for failing to obtain the statement Dixon made to police, and, as a result, failed to discover the value of Dixon's testimony as a defense witness. Counsel does not appear to have been entirely dilatory. At a hearing on various motions, during which defendant requested new counsel and the court appointed a third attorney to represent him, defendant's second attorney stated that:

> [defendant] and I discussed on Wednesday that there is a statement from defendant number three that was not in the packet. I talked to the prosecutor just a few minutes ago to indicate to her that I did not have a copy. She showed me that she didn't have a copy in her packet also. So she has got to go to the OIC to get the packet to see if she can find that statement from defendant number three and in the Investigator's Report it does say that defendant number three did make a statement.

At the end of the hearing, the prosecutor again stated that she would obtain the police jacket from the officer in charge and provide it to defense counsel. Immediately prior to trial, the court said it needed to address defendant's motion for discovery in order to make a complete record and asked defendant what discovery was missing. Defendant replied, "Defendant three statement," and "[t]he only thing missing out of this is here that says the statement was made." Then defendant and the court began discussing the dismissal without prejudice of previous charges brought against defendant. Following that discussion, the court denied defendant's motion as lacking a factual basis.

The record does not persuade us that counsel's performance fell below professional standards. More significantly, it appears that defendant's appellate attorney has obtained a copy of Dixon's statement and provided it on appeal. On that basis, we are equally unpersuaded that Dixon's testimony would have been favorable to defendant. Dixon did say that Thomas brought the guns to the house and they belonged to Thomas. However, when asked who had the guns when the police arrived, Dixon responded that "[t]hey were on the table and both guys was looking at them [unreadable] hit the door and I ran outside." Defendant was not charged with ownership of the guns, but rather with possession of a gun at the time of the police raid. Under the felony-firearm statute, a defendant "possesses" a gun when that gun is readily accessible and available to him, and we conclude that the same definition of possession applies in the context of felon-in-possession. *People v Burgenmeyer*, 461 Mich 431, 436-440; 606 NW2d 645 (2000); see also *People v Dillard*, 246 Mich App 163, 169-170; 631 NW2d 755 (2001) (observing that the purpose of the felon-in-possession statute is to keep guns out of the hands of those known to be most likely to use them against the public). Dixon's statement therefore indicates that defendant *was* in possession of the guns, and we decline to speculate whether he might have testified to the

[3] Furthermore, as we will discuss, the trial court could not have compelled discovery of test results that did not exist.

contrary. Even if defendant could show that counsel's failure to obtain Dixon's statement and call him as a witness was not a matter of trial strategy, he has failed to demonstrate that this failure was prejudicial.

Finally, defendant argues that counsel was ineffective for failing to help him establish a factual basis for his in propria persona motion to compel discovery. Defendant's argument is unclear, but it appears that he was again attempting to obtain Dixon's statement, and he asserts that counsel should have mentioned to the court that the prosecutor had previously acknowledged that a police statement from Dixon existed. We are not persuaded that counsel's failure to do so constituted deficient performance, and as discussed, we are in any event not persuaded that defendant was prejudiced.

Defendant next argues that the trial court abused its discretion in denying defendant's motions for discovery of fingerprint testing, not ruling on defendant's request for Dixon's statement, "and not requesting counsel to provide a factual basis for [defendant's] request for this evidence before denying it based on the lack of a factual basis." We disagree. We review issues involving the interpretation of a court rule de novo as questions of law, and a trial court's decision regarding discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583; 663 NW2d 463 (2003).

Defendant makes a bare assertion that the court's denial of his motion to compel fingerprint testing denied him a right to a fair trial by preventing him from testing crucial evidence. We disagree. The trial court concluded that there was a very low likelihood that there were any fingerprints to be found, given the prosecution's failure to preserve them, and that the prosecution's failure was "a good argument you could make to the jury." We do not believe this was outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Moreover, nothing in MCR 6.201, which governs discovery in criminal cases, permits a trial court to compel the police or prosecution to perform a fingerprint analysis, where one has not yet been completed. See *Phillips*, *supra* (holding that nothing in MCR 2.601 permitted the trial court to compel the creation of an expert witness report that did not exist). We find no merit in defendant's assertion that the trial court failed to rule on his motion for discovery of Dixon's statement, because the trial court did in fact rule on it, both on the record and in a written order. A trial court is not required to make findings of fact when ruling on a pretrial motion, *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993), and defendant cites no authority for the proposition that the trial court should have asked defense counsel to provide a factual basis for defendant's motion to compel discovery of the statement.

Defendant's third argument on appeal is that he was denied his due process right to obtain Dixon's statement, which was in the possession of the police or prosecutor and was exculpatory, material evidence that would raise a reasonable doubt about his guilt by introducing evidence of the culpability of a third person. We disagree.

In general, we review constitutional due process claims de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). However, because defendant did not allege a violation of due process before the trial court, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is only warranted if an error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public

reputation of judicial proceedings, independent of the defendant's innocence. *Id*. "A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." *People v Cox,* 268 Mich App 440, 448; 709 NW2d 152 (2005). However, among other things, the defendant must show a reasonable probability that the outcome of the proceedings would have been different had the evidence been disclosed to the defense. *Id*., 448. As discussed, defendant has not shown that Dixon's statement would have been favorable to him, and we find that defendant has likewise failed to show that Dixon's testimony would have been favorable to him.

Defendant finally argues that the cumulative effect of the claimed errors denied him a fair trial. We disagree. A defendant may indeed be denied a fair trial by the cumulative effect of several minor errors that would not individually mandate reversal, but there must actually be errors, and those errors must have had *some* prejudicial effect. *People v Ackerman,* 257 Mich App 434, 454; 669 NW2d 818 (2003). We find no error and no prejudice, so there can be no cumulative error.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis